



Administrative Tribunal

Distr.
LIMITED

AT/DEC/622
12 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 622

Case No. 659: ARAIM

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,
Composed of Mr. Jerome Ackerman, President; Mr. Samar Sen,
Vice-President; Mr. Ioan Voicu;

Whereas, on 2 March 1992, Amer Salih Araid, a staff member of
the United Nations, filed an application requesting the Tribunal,
inter alia:

- "1. To find that the Administration failed to advertise the post of Secretary of the Special Committee against Apartheid as required by [General Assembly] resolution 33/143, part. 1, paragraph 1(a) of 20 December 1978 and therefore violated his right to be considered for that post.
2. To find that the Administration has failed to observe staff regulation 4.4 by not giving consideration to the candidacy of the Applicant for the vacant post and resorting instead to outside recruitment.
3. To find that the Office of Human Resources Management (OHRM) violated his rights by ignoring the report of the Panel on Discrimination and Other Grievances on his case, dated 1 July 1991, ...
4. To find that the Joint Appeals Board's Panel erred by refusing to take into account and to act upon the report of the Panel on Discrimination and Other Grievances.

5. To find that the Joint Appeals Board's Panel erred in law when it found that the outside recruitment of Mr. Tesfaye Tadesse constitutes a valid explanation [sic] of the Secretary-General's discretionary power.

...

8. To order the Secretary-General to immediately take action to end the discrimination to which the Applicant has been subjected due to his ethnic origin, to promptly advertise the post of Secretary of the Special Committee against Apartheid (no advertisement has yet been made, although the contract of the incumbent ends on 31 March 1992), and to give full and fair consideration for the candidature of the Applicant for this post.

9. To award the Applicant compensation equal to two years base salary for the injury sustained by him as a result of the on-going discrimination he has been subjected to, including the pre-determination to exclude his candidature to the post of Secretary of the Special Committee against Apartheid from consideration despite the Tribunal's Judgement No. 533, Araim."

Whereas the Respondent filed his answer on 20 March 1992;

Whereas the Applicant filed written observations on 8 and 26 May 1992;

Whereas, on 2 June 1992, the Respondent filed an additional statement;

Whereas, on 10 July and 4 December 1992, the Applicant submitted additional documents and on 18 December 1992, the Respondent submitted his comments thereon;

Whereas, on 12 January 1993, the Applicant submitted an additional statement and on 27 January 1993 the Respondent commented thereon;

Whereas, on 9 February and 18 and 28 May 1993, the Applicant submitted additional statements;

Whereas, on 4 June 1993, the Tribunal put questions to the Respondent and requested the production of a document;

Whereas, on 7 and 10 June 1993, the Respondent complied with the Tribunal's request;

Whereas, on 15 June 1993, the Tribunal put further questions to the Respondent, to which he provided answers on 21 June 1993;

Whereas, on 25 June 1993, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn consideration of the case;

Whereas, on 25 June and 8 July 1993, the Applicant submitted comments on the Respondent's submissions;

Whereas, on 24 August 1993, the Respondent submitted an additional statement and on 15 October 1993, the Applicant provided his comments thereon;

Whereas, on 19 October 1993, the Tribunal put further questions to the Respondent, to which he provided answers on 26 October and 3 November 1993;

Whereas, on 29 October and 5 November 1993, the Applicant submitted an additional statement.

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 8 August 1978, on secondment from the Government of Iraq, on a fixed-term appointment for three years, as a Political Affairs Officer at the P-4 level, in the Council and Committee Services Section, Security Council and Political Committees Division, Department of Political and Security Council Affairs. On 1 June 1981, he was reassigned to the Committee Services and Research Branch of the Centre against Apartheid, within the same department. On 8 August 1981, after the Applicant's resignation from the service of his government, his appointment was extended for three years. On 1 April 1982, he was promoted to the P-5 level, as Senior Political Affairs Officer and became Secretary of the ad hoc Committee on the Drafting of the International Convention against Apartheid in Sports and Deputy Secretary of the Special Committee against Apartheid. On

1 May 1989, he received a probationary appointment, which was converted to a permanent appointment on 1 January 1985. The Applicant has, since then, served as Secretary to various groups and committees, and as Deputy Secretary of the Special Committee against Apartheid.

In June 1991, the Secretary of the Special Committee against Apartheid died and the Applicant was appointed Acting Secretary. On 14 August 1991, the Applicant wrote to the Assistant Secretary-General, Office of Human Resources Management (OHRM), expressing an interest in the post he encumbered. He stated that, in view of his previous experience, the recommendations of the Joint Appeals Board (JAB) and of the Panel on Discrimination and Other Grievances (the Panel on Discrimination) in a prior case, he assumed his candidacy would be taken into account when the post of Secretary of the Special Committee Against Apartheid was to be filled. He further assumed that the post would be advertised soon.

In a memorandum dated 21 August 1991, the Assistant Secretary-General, Committee Against Apartheid (CAA), requested the Assistant Secretary-General, OHRM, to appoint Mr. Tesfaya Tadesse, former Permanent Representative of Ethiopia to the United Nations, temporarily, to the vacant post of Director, Office of the Assistant Secretary-General and as Secretary of the Special Committee against Apartheid, for seven months. He specified the post requirements, indicating that it involved "extensive consultations within and outside the United Nations and a profound understanding of developments both in South Africa and in the outside world". This "sensitive political role" required that the incumbent possess "highly developed diplomatic skills and judgement". He added: "I believe that given the possible changes that the upper echelons of the Secretariat would undergo by the end of February 1992 - changes that might affect also the head of the Centre - it is more appropriate at this stage to fill this post on a temporary basis and

allow myself or my successor to make a permanent appointment through the vacancy management process sometime early next year."

In a memorandum dated 3 September 1991, the Assistant Secretary-General, CAA, announced to all CAA staff, that the functions of the Director of the Office of the Assistant Secretary-General and Secretary of the Special Committee against Apartheid would be carried out by Mr. Tesfaya Tadesse, the former Permanent Representative of Ethiopia to the United Nations.

On 18 September 1991, the Applicant requested the Secretary-General to suspend the decision. Not having received a reply, the Applicant lodged an appeal with the JAB on 18 October 1991, requesting, under staff rule 111.2(f), to "injunction the Administration from filling this vacancy any more through temporary assignment until my appeal is decided".

On 31 October 1991, the Board adopted its report on the request for suspension of action. Its consideration and recommendations read as follows:

"Consideration and recommendations

14. The Panel noted that although the request for suspension of action met the conditions set forth in the Staff Rules and the JAB Rules of Procedure, since Mr. Tadesse's contract expires in April 1992, there was no urgency for immediate action. The Panel felt that the request for suspension of action is an integral part of the relief being sought by the Appellant in his appeal, and it would be useful to consider it in that context. Moreover, the Panel was aware of the Appellant's concern that the Administration might create new circumstances regarding the post in question while the JAB was considering his appeal.

15. The Panel expects that the Panel considering the substance appeal will do so speedily and will certainly conclude before 28 February 1992. Based on this and on the statements of the parties, the Panel recommends that any action to fill the post in question be suspended until 28 February 1992 or until

the Panel submits its recommendation on the substance of the appeal, if earlier. This in no way, however, precludes following the normal procedures for advertising the vacancy."

In a letter dated 7 November 1991, the Director, Office of the Under-Secretary-General for Administration and Management, informed the Applicant as follows:

"The Secretary-General has examined your request for suspension of action in the light of the Board's report. The decision to fill the post temporarily through the appointment of Mr. Tadesse became effective on 3 September 1991. Such decision cannot therefore be stayed. The Secretary-General has decided therefore that your request cannot be accepted."

On 29 January 1992, the Board adopted its report on the merits of the case. Its considerations and recommendations read as follows:

"Consideration and recommendations

15. The Panel noted that the decision of the Secretary-General to fill temporarily the post of Director of the office of the Assistant Secretary-General, and Secretary of the Special Committee without announcing the above mentioned vacancy, was taken within his discretionary power.

16. The Panel understands the Appellant's concern that by appointing another person temporarily to the post in question, the Administration is denying the Appellant the chance to be fairly and seriously considered for the vacant post. However, the Panel noted that the Appellant did not bring sufficient evidence nor did he reveal any facts indicating that the Secretary-General's decision to fill the post in question with an external candidate was made in bad faith or was motivated by prejudice or any other extraneous factors.

17. On the other hand, the Panel took note of the Respondent's statement concerning appointment of the external candidate i.e. 'As an interim solution until such selection could be made, an external candidate was placed against the subject post on a seven-month

contract ... a request for confirmation of the level of the post with a view to issuing a vacancy announcement was submitted by the Department to Classification, OHRM, as early as 12 July 1991.'

18. On the basis of the Respondent's reply, the Panel is expecting that the post in question will be advertised as soon as possible, so that suitable candidates will be able to apply for consideration when the seven-month contract of the external candidate expires. The Panel is of the opinion that the selection of a candidate to the post in question should be made in accordance with the procedure set forth in administrative instruction ST/AI/373 of 23 December 1991.

19. The Panel trusts that when the vacancy announcement is issued, the Appellant will receive the full and fair consideration to which he is entitled and that the Administration will act in a fair manner regarding the vacancy circulation announcement and the selection process.

20. In view of the aforesaid, the Panel unanimously decides to make no further recommendation in support of this appeal."

On 3 February 1992, the Director, Office of the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined the case in the light of the JAB report and had decided to maintain his decision. He added: "[The Secretary-General] wishes to confirm that you should be considered, in accordance with staff rule 104.14(f)(iii) and the relevant provisions of administrative instruction ST/AI/373, for current and foreseeable vacancies in your department, including the vacancy which will arise in respect of the post which was the subject of your appeal."

On 2 March 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The post of Secretary of the Special Committee against Apartheid was not advertised in accordance with the former Vacancy Management System.
2. The Applicant was not fairly considered for the post.
3. The decision not to promote the Applicant is a further example of discrimination by the then Assistant Secretary-General, CAA, who, since his arrival in 1987, discriminated against him.

Whereas the Respondent's principal contention is:

The former Secretary-General had discretion to decide that it was in the interest of the Organization to appoint a qualified individual to a senior post on a temporary basis, pending changes in the Secretariat, expected to be introduced by the incoming Secretary-General.

The Tribunal, having deliberated in Geneva from 3 to 24 June 1993 and in New York from 19 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant appeals from a decision by the Respondent dated 3 February 1992, based on a Joint Appeals Board (JAB) report dated 29 January 1992, which considered the Respondent's action in filling temporarily the then combined post of Director of the Office of the Assistant Secretary-General in the Centre Against Apartheid (CAA) and Secretary of the Special Committee Against Apartheid, Department of Political and Security Council Affairs. The Applicant challenges that decision because the appointment was made without announcing the vacancy. The Applicant further claims that he was unfairly and discriminatorily treated by not being fairly and seriously considered for the post. Those are the only two issues before the Tribunal. Other matters raised by the Applicant, such as an allegedly wrongful downgrading of a post, which were not considered by the JAB, are not properly before the Tribunal.

II. When the JAB report was adopted, it was anticipated, based on submissions on behalf of the Respondent, that the post in question would be advertised within a few months. With that in mind, the JAB was of the opinion that the selection of a candidate for the post should be made in accordance with the procedure set forth in administrative instruction ST/AI/373, dated 23 December 1991, and that the Applicant should receive full and fair consideration for the post.

III. Shortly thereafter, however, the situation envisaged by the JAB changed. In response to a question put by the Tribunal relating to the issue of alleged discrimination, the Tribunal was informed by the Respondent that, as a result of reorganization and restructuring of the Secretariat, the content of the post in question, which had previously been at the D-1 level, was revised. The CAA was placed under the Department of Political Affairs and the former Assistant Secretary-General who had been in charge of it was replaced by a person at the D-2 level, with responsibilities additional to those previously assigned to the Assistant Secretary-General. The CAA is now part of a unit, headed by a D-2 staff member and is entitled "Programmes Against Apartheid and for Political Rights". The Special Committee Against Apartheid is now within the Committee Services and Research Branch of the Centre and is headed by a D-1 level staff member. It is serviced by a Secretary, currently the Applicant, at the P-5 level. The post sought by the Applicant thus appears not to be the same as the post considered in the JAB report. The combined D-1 level post that had previously been part of the Assistant Secretary-General's office was set aside for future use by the office of the Under-Secretary-General. The Applicant has, however, raised questions as to whether, in fact, the temporary incumbent of the post was required to perform or performed both functions.

IV. The JAB found that the Respondent's decision to fill temporarily the post that previously existed, without a prior

vacancy announcement, was within his discretionary authority. It also found that the evidence was insufficient to establish that the Respondent's decision to fill that post with an external candidate was made in bad faith or was motivated by prejudice or any other extraneous factors. Although the JAB's report and the Respondent's decision were overtaken by events, the Applicant's claim of unlawful treatment and discrimination in connection with the temporary external filling of the post, must be considered by the Tribunal.

V. The post in question became vacant by reason of the death of the incumbent in June 1991. His Committee responsibilities were carried out by the Applicant, who served as Acting Secretary of the Special Committee. On 14 August 1991, the Applicant called to the attention of the Assistant Secretary-General, OHRM, that he had been acting in this capacity and asked that earlier recommendations that he be fairly considered for promotion to the D-1 level, be taken into account when filling the post of Secretary of the Special Committee. The Applicant anticipated that the post would soon be advertised under the Vacancy Management System. On 21 August 1991, the Assistant Secretary-General of the CAA, communicated with the Assistant Secretary-General, OHRM, regarding the combined post which had become vacant. With the endorsement of the Under-Secretary-General in charge of the Department, he informed the Assistant Secretary-General, OHRM, that the post involved extensive consultations within and outside the UN and required a profound understanding of developments, both in South Africa and in the rest of the world. He felt that the sensitive political role of the post required that the incumbent should possess highly developed diplomatic skills and judgement. He stated his belief that a possible change in the upper echelons of the Secretariat by February 1992, might also affect the post he occupied as head of the CAA. It was therefore more appropriate to fill the post on a temporary basis and allow whoever might eventually be the head of the CAA, to decide on a permanent appointment early in 1992. It may be noted, parenthetically, that the "possible change" materialized, as set

forth in paragraph III above and a significant reorganization occurred which affected the post in question. The Assistant Secretary-General requested a seven-month temporary appointment of an external candidate who had formerly been the Permanent Representative of Ethiopia to the United Nations. This proposal, having apparently been approved by the Under-Secretary-General in charge of the Department, was implemented and the external candidate assumed the post in September 1991. His initial temporary appointment was extended by short-term monthly contracts until 31 July 1992. He served for approximately eleven months, though the D-1 post was redeployed after the restructuring described in paragraph III above took place.

VI. The Tribunal has held that all vacancies are to be advertised, although the Secretary-General has the authority to indicate in the advertisement how he would fill the vacancy. Moreover, the lack of advertisement in a given case would be irrelevant, if it were established that an applicant was in fact given adequate consideration. Cf. Judgement No. 447, Abbas (1989), paragraph VII. Of course, situations may arise in which it is simply not feasible to advertise a vacancy because of an urgent need to fill a post temporarily. In such cases where: (1) there is a reasonable explanation justifying the temporary action, and (2) the initiation and duration of temporary measures are not unduly prolonged before the proper procedures are undertaken, it is plainly within the Respondent's authority as Chief Administrative Officer to meet the needs of the Organization in that fashion. But this does not mean that the rights of the staff to be fairly considered for vacancies through advertising procedures can be ignored merely on the basis of insubstantial excuses. The principle of fair treatment of the staff calls for reasonable efforts to avert the need for temporary external appointments which adversely affect staff opportunities for advancement. When such appointments are necessary, they should be limited to the shortest possible duration.

VII. In this case, some explanation, as described above, was forthcoming. However, the Tribunal fails to see why, given the considerations described by the Assistant Secretary-General, CAA, it took from June 1991, when the incumbent of the post died, until the latter part of August, for the Assistant Secretary-General, CAA, to decide, without advertising, that the post had to be filled hurriedly by an external candidate. There was ample time to see whether a suitable internal candidate might be found - even on a temporary basis, subject to the uncertainties of a possible reorganization. Furthermore, during the eleven months after the temporary appointment to the post, an effort could have been made toward replacing the external appointee with a suitable internal candidate - again on a similar temporary basis, if necessary. There is no indication that the external candidate's qualifications were ever evaluated on a comparative basis with anyone else's, thus undermining the protection intended for the staff by the requirement that vacancies be advertised. The sequence and timing of the events in this case lead the Tribunal to conclude that the temporary appointment of the external candidate was prearranged, without any proper consideration having been given to advertising the post. This necessarily foreclosed any meaningful consideration of internal candidates who might have had qualifications equal or superior to those of any external candidate.

VIII. Had the vacancy been advertised as a temporary post, subject to the uncertainties associated with a possible reorganization, it is by no means clear to the Tribunal that the Applicant would have been selected if he had applied. The Assistant Secretary-General, CAA, apparently did not think highly of the Applicant's qualifications, despite performance evaluations which did not make this clear. In post hoc submissions, the Assistant Secretary-General, CAA, explained his views. However, in the context of the issue before the Tribunal, such after-the-fact explanations do not overcome the infringement of the Applicant's rights by the unjustified procedure in this case, which deprived him (as well as

other potential applicants), of the opportunity to be considered on the basis of comparative qualifications for the post. In short, neither the Applicant nor anyone other than the external candidate, was given any, much less adequate, consideration, and the Applicant was injured by that irregularity. For that injury, he is entitled to compensation.

IX. With respect to the Applicant's claim that his non-selection for temporary assignment to the post was motivated by discrimination against him on account of his national origin or ethnic background, the Tribunal concurs with the conclusion reached by the JAB that the Respondent's decision to fill the post temporarily with an external candidate was not motivated by prejudice against the Applicant based on national origin or ethnic background. The Tribunal has taken into account the report and recommendations of the Panel on Discrimination and Other Grievances (the Panel on Discrimination), as well as the Administration's position with regard thereto. The latter is set forth in communications to the Panel on Discrimination and to the Under-Secretary-General for Administration and Management in an ad hoc report. This report addresses the Panel on Discrimination's findings and recommendations and the various claims asserted by the Applicant. The Tribunal does not view the ad hoc report as the equivalent of a report by the Panel on Discrimination. Rather, in the context of this case, the Tribunal has considered it only as a response to the assertions by the Applicant of discriminatory treatment, and as an explanation for the Administration's unwillingness to adopt the recommendations made by the Panel on Discrimination. In the Tribunal's view, the latter recommendations rest mainly on subjective impressions and unsubstantiated inferences based on material of little probative value. In the circumstances of this case, the Tribunal, like the JAB, is unable to find that the Applicant was the victim of discrimination based on ethnic or national origin.

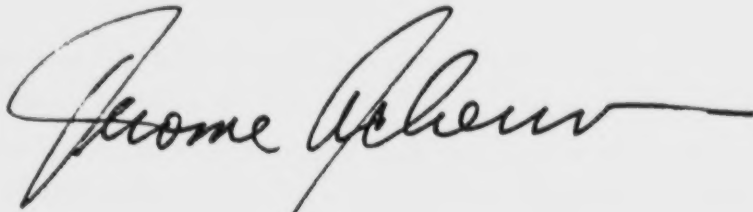
6. For the foregoing reasons and as set forth in paragraph VIII, the Tribunal orders that:

(a) the Respondent pay US\$2,000, as compensation to the Applicant for the injury sustained by him; and that

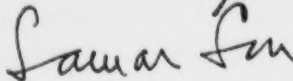
(b) all other claims be, and they are, rejected.

Signatures)

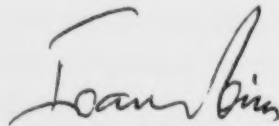
Jerome ACKERMAN
President



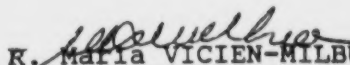
Samar SEN
Vice-President



Ioan VOICU
Member



New York, 12 November 1993



E. Maria VICIEN-MILBURN
Executive Secretary



Administrative Tribunal

Distr.
LIMITED

AT/DEC/623
12 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 623

Case No. 670: MILLER

Against: The Secretary General of
the International Civil
Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding;

Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Bernard Miller, a staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), the President of the Tribunal, with the agreement of the Respondent, extended to 15 May 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 13 May 1992, the Applicant filed an application requesting the Tribunal, inter alia:

"11. (a) to find that ... the decision of the ICAO Director of Administration, ..., to issue a reprimand to be placed on his personal file on 6 December 1990;

...

iii. was tainted with abuse of authority and was discriminatory...

(b) to order the Respondent to have the reprimand removed from the Applicant's personal file.

...

12. ...

- (b) to order the Respondent to take appropriate disciplinary measures against the Director of Administration in connection with his issuing of a recommendation of illegal action;

...

- (d) to determine an amount of compensation to be paid to the Applicant for the injury sustained by him.

...

15. (a) to find that the decisions of the Respondent:

- i. to approve retroactively in September 1991, the withholding of the Applicant's annual increment, due on 2 January 1991 and to delay the increment date to 2 July 1991, a procedure governed by ICAO staff rule 103.2 and staff regulation 3.2 was unfounded in fact and in law, and

...

- (b) to order the Respondent to rescind his decision to withhold the Applicant's increment;
- (c) to order the Respondent to reinstate the increment with interest up to the time of reinstatement, and
- (d) to determine compensation to be paid for the injury sustained by the Applicant.

..."

Whereas the Respondent filed his answer on 30 November 1992;

Whereas the Applicant filed written observations on
25 January 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 2 January 1990, on a fixed-term appointment at the P-3 level, as a Language Officer (Interpreter/Translator). He was assigned to the Interpretation Section, Language and Publications Branch (LPB) of the Bureau of Administration and Services (ADB). The letter of appointment provided that the "appointment ... shall include a probationary period of one year during which, if the Secretary General is not satisfied with your services, the appointment may be terminated by one month's notice or salary in lieu thereof...". On 1 November 1990, the Chief, LPB, and the Director, ADB, recommended that the Applicant's probationary period be considered as satisfactorily completed.

According to the record, at a meeting of the Governing Council held on 5 December 1990, the President of the Council informed delegations that the meeting would be suspended on account of "a little technical problem". The Applicant, however, did not leave his booth, but stood up, "connected [his] microphone and said: 'The interpreters apologize, we do not have a little technical problem we have a major air problem'" after which he "violently threw [his] speaker and earphones on [his] table and left the booth, an action which most Representatives on the Council saw."

In a memorandum dated 6 December 1990, the Director, ADB, informed the Applicant as follows:

"4. ...You will no doubt realize the seriousness of your misconduct as your function in a meeting of the Governing Body of the Organization is to interpret what the speaker has said and not to add, rectify or clarify what he has said. In this particular instance there was no need for interpretation since the President of the Council had expressed himself in English.

5. Consequently, in accordance with staff rule 110.1, paragraph 3, I am issuing to you this written reprimand which will be placed in your file.

6. Furthermore, in view of the seriousness of the misconduct and notwithstanding the satisfactory

performance of your assigned duties, I have decided to recommend to the Secretary General that your probationary period be extended for a period of six months since I cannot under regulation 4.11 certify that I am satisfied with your services."

In a letter dated 21 December 1990, the Chief of the Personnel Branch, informed the Applicant that the Secretary General had approved the Director, ADB's, recommendation concerning the extension of the Applicant's probationary period of service. Consequently, it was extended until 30 June 1991. On 2 January 1991, the Applicant asked the Secretary General to review this decision.

In a further exchange of correspondence between the parties, the Applicant expressed regret that he was made so ill by the conditions in the interpreters' booth that he acted in a manner which might have caused offence. On 18 January 1991, the Applicant again requested the Secretary General to review the decision contained in the letter of 21 December 1990. The Applicant reiterated that the action to extend his probationary period of service did not fall within any of the provisions of the ICAO Staff Regulations, and that its duration was governed by the terms of his contract of employment, which could not be changed unilaterally.

On 13 February 1991, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). The Board adopted its report on 21 June 1991. Its conclusions read as follows:

"91. Taking account of the submissions made and the evidence presented, the Board considers that the Organization's decision to extend the Appellant's probationary period was unfounded in fact and in law and unanimously recommends that the extension be rescinded and the Appellant's probationary period be considered as having ended on 1 January 1991.

92. The Board rejects the other contentions of the Appellant and makes no further recommendations with regard to this case."

On 9 July 1991, the Secretary of the AJAB transmitted to the Applicant a copy of the AJAB's report and informed him of the Secretary General's decision on the report. The Secretary General's decision, dated 8 July 1991, reads as follows: "I accept the Board's recommendation. Consequently, the probationary period of Mr. Miller is considered to have been completed on 1 January 1991."

In a memorandum dated 20 August 1991, the Director, ADB, recommended to the Secretary General, that the step increase which would have normally become due on 2 January 1991, "be delayed and granted to [the Applicant] with effect from 2 July 1991". The Director, ADB, argued, in support of his recommendation, that it would not "be equitable" to grant a step increase in light of the written reprimand of 6 December 1991. Accordingly, on 19 September 1991, the Secretary General informed the Applicant as follows:

"... following the written reprimand issued to you by [the Director]/ADB on 6 December 1990, I have decided that your step increase which would have normally become due on 2 January 1991, would be delayed and would instead be granted as from 2 July 1991."

On 8 October 1991, the Applicant requested the Secretary General to review this decision, and in the absence of a positive response, sought the Secretary General's agreement to submit his appeal on this matter, directly to the United Nations Administrative Tribunal. In a letter dated 28 October 1991, the Secretary General informed the Applicant that he would maintain the decision and granted his consent to direct submission of the appeal on this question, to the Tribunal.

On 13 May 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent did not resort to informal methods of drawing attention to disciplinary problems as required by staff rule 110.13.

2. The Respondent was aware of the existence of serious and persistent cases of illness related to the ICAO building, particularly affecting the interpreting booths, reported extensively since 1978 and including those occurring in the week of 3 December 1990.

3. The contested decisions are tainted with abuse of authority and were unfounded in fact and in law and should be removed from the Applicant's file.

Whereas the Respondent's principal contention is:

The decisions to issue a written reprimand to be placed on the Applicant's personnel file and to delay the step increase of the Applicant until 2 July 1991, constituted a proper exercise of the Respondent's authority and not an abuse of power.

The Tribunal, having deliberated from 29 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant has asked for expert evidence, witnesses and oral proceedings. The Tribunal considers that the material before it is adequate and additional details of events are not necessary for a decision. Therefore, the request for hearing of witnesses is denied.

II. In substance, the Applicant appeals against the decisions to issue a written reprimand and to delay his salary increment.

III. The Applicant also questions the legality of the recommendation by the Director of the Bureau of Administration and Services to the Secretary-General, which led to the decision to extend the Applicant's probationary period of service beyond 1 January 1991.

The Tribunal notes that on 8 July 1991, the Respondent accepted the recommendation of the Advisory Joint Appeals Board (AJAB) that the extension of the Applicant's probationary period be

rescinded and considered as having ended on 1 January 1991. The Tribunal considers, therefore, that this issue has been resolved.

IV. The Tribunal notes that, following the incident which took place in the ICAO Council Chamber on 5 December 1990, the Director of the Bureau of Administration and Services issued, on 6 December 1990, a written reprimand to be placed on the Applicant's file.

The ICAO Staff Rules provide in staff rule 110.1 for disciplinary measures arising out of the unsatisfactory conduct of a staff member. Paragraph 3 of staff rule 110.1 states inter alia that "Officials responsible for the supervision of staff ... may issue written warnings or reprimands, which will not be regarded as formal disciplinary actions..."

V. In the present case, the Tribunal observes that most of the grounds invoked by the Applicant on the question of the decision to issue a written reprimand were carefully examined by the AJAB which reported that "the Board is not convinced that the decision to issue the reprimand was improperly taken." The Tribunal endorses this finding and considers that the action taken by the Director of the Bureau of Administration and Services in issuing a written reprimand was in full compliance with the authority vested in him, in accordance with staff rule 110.1, paragraph 3.

VI. The Applicant further argues that the decisions of the Respondent to approve retroactively, in September 1991, the withholding of the Applicant's annual salary increment, due on 2 January 1991, and to delay the increment date to 2 July 1991, were unfounded, in fact and in law. The Applicant, therefore, asks for the rescission of those decisions, for the reinstatement of the increment with interest up to the time of reinstatement, as well as for compensation for the injury sustained.

VII. In this respect, the Tribunal finds that, in granting an annual salary increment, the Secretary General of ICAO has

discretionary powers based on staff rule 103.2, paragraph 3. The Tribunal cannot review the contested decisions, unless they were tainted by improper motives or other extraneous factors.

VIII. Taking into account all the circumstances, the Tribunal holds that the contested decisions were taken after careful consideration. They constitute a valid exercise of the Secretary General's discretionary authority in the matter, in conformity with the applicable procedures.

IX. Nevertheless, the Tribunal cannot overlook the fact that the Applicant was not informed of the withholding of the increment until nine months after it had been implemented and had no opportunity to make representations or seek redress through regular channels.

The Respondent himself acknowledges that "having received the recommendation from the Director of the Bureau of Administration and Services to delay the increment, he elected not to delay his decision unnecessarily and therefore did not request the Applicant to submit anew his presentation on the case according to the provisions of staff rule 103.2, paragraph 3" (emphasis added).

X. In the Tribunal's view, while the decision by the Respondent dated 19 September 1991, to delay the step increase of the Applicant until 2 July 1991, was a proper exercise of his authority and did not constitute an abuse of power, the decision not to request the Applicant to submit anew his presentations, amounts to a procedural irregularity for which the Applicant is entitled to some monetary compensation.

XI. The Applicant has also requested the Tribunal to adjudge and clarify some aspects of a general legal and practical nature concerning health problems, the institution of safeguards for the protection of rights of staff members and of appropriate disci-

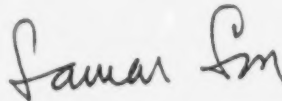
plinary procedures against some ICAO officials. The Tribunal sees no need to deal with such questions which are outside its competence.

XII. For the foregoing reasons, the Tribunal orders the Respondent:

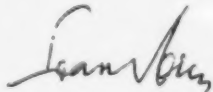
- (a) to pay to the Applicant compensation of US\$1,500.00 for the injury sustained as a result of procedural irregularities; and
- (b) to incorporate a copy of this judgement in the Applicant's personnel files;
- (c) all other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding



Ioan VOICU
Member



Francis SPAIN
Member



New York, 12 November 1993



R. Maria VICIEN-MILBURN
Executive Secretary